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Agency-Level Bid Protest Reform: Time For a Little *Less* Efficiency?

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I. INTRODUCTION

The agency-level bid protest mechanism of FAR 33.103¹ has been a formal part of the government procurement landscape for about eight years now. In large part, the forum has delivered the benefits its architects envisioned. Bid protests to agencies are inexpensive, procedurally simple, and expeditiously resolved. The option's informal and non-adversarial character, which distinguishes it from the other protest fora,² has provided incentive for agencies and contractors to openly exchange information and flexibly resolve problems.³ And yet, for all of its apparent advantages, the agency-level protest option has seen declining use in recent years⁴

¹ 48 C.F.R. (Federal Acquisition Regulation (FAR)) § 33.103 [hereinafter FAR].

² Government contractors may also bring their protests to the Government Accountability Office (GAO), whose jurisdictional statute is 31 U.S.C. § 3551 et. seq., or the United States Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491(b).

³ By way of example, the Army Material Command (AMC) bid protest program takes "corrective action" in 15% of agency-level bid protest cases – although very few of these cases result in what might be considered sustained protests. Interview with Vera Meza, Chief, Protest/Litigation Branch, Office of Command Counsel, AMC, at Fort Belvoir, Va. (Nov. 8, 2004) [hereinafter Meza Interview]. The Office of Command Counsel is the focal point for bid protests in AMC.

⁴ Few agencies track their agency-level bid protests statistics. AMC and the US Army Corps of Engineers (USACE) are among the exceptions. The average number of protests filed at AMC has declined from 68 per year during the period from FY1992 to FY 1997 to 29 per year for the period since FY1997. The number of GAO and agency-level protests filed "against" AMC and USACE in recent years is as follows:

FY	AMC		USACE	
	GAO	Agency	GAO	Agency
1999	73	23	80	77
2000	75	28	69	62
2001	86	42	59	56
2002	57	21	55	56
2003	49	34	59	59
2004	69	20	61	38

Meza interview, *supra* note 3. Telephonic interview with Karen D. Thornton, Assistant Counsel for Procurement, HQ, US Army Corps of Engineers (Dec. 9, 2004) [hereinafter Thornton Interview]. The decline in numbers may indicate contractor dissatisfaction with the forum or may just as well reflect the overall trend of decreased litigation in both the bid protest and contract claims venues. For example, bid protest filings at the GAO declined from a high of 3,377 in 1993 to 1,352 in 2003. Similarly, the number of appeals docketed at the various boards of contract appeals have declined dramatically since the early 1990s. The Armed Services Board of Contract Appeals saw 2,218 appeals docketed in 1990 and only 435 in 2002. See Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 Pub. Cont. L.J. 505 at 531 (Spring 2004).

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and still sits squarely in the shadow of the Government Accountability Office's (GAO) bid protest forum.

From the time of the forum's inception, observers have maintained it would be more attractive and, hence, see greater use, if the playing field were tilted a bit more toward contractors⁵ – for example, by guaranteeing contractors a “stay” of award or performance of protested procurements until their protests are resolved, whether at agency level or in subsequent proceedings at the GAO;⁶ by designating high-level agency personnel as protest decision-makers in order to increase the likelihood of independence in decision-making; or by providing some form of limited discovery.⁷ In practice, however, many, if not most, agencies have developed programs that appear to strike a workable balance between efficiency (high speed, low cost) and fairness (just decisions and meaningful relief)⁸ such that contractors are annually bringing hundreds of protests to them – suggesting that the system is already adequately inviting.

So where does that leave us? Measured against the efficiency-based goal of reducing the

⁵ See generally *Bid Protests: FAR Rule on Agency-Level Protests Provides Little Guidance Beyond Executive Order*, 8/5/96 Fed. Cont. Daily (BNA) (members of private bar highly critical of the interim version of FAR 33.103 for its failure to, among other things, require agencies to vest bid protest decision-making authority in agency officials insulated from the contracting officer or provide a mechanism for some form of discovery). The private bar's concerns remain largely unchanged today. Attorneys practicing in the government contracts arena still express reservations about the agency-level system's fairness to contractors – with the result that they recommend bringing only the most clear cut protests to the agencies for resolution. Interview with John Pachter and Jonathan Shaffer, Smith Pachter McWhorter & Allen PLC, at Vienna, Va. (Jan. 4, 2005) [hereinafter Pachter/Shaffer Interview].

⁶ See *infra* notes 35-44 and accompanying text for a discussion of the current “stay” rules under FAR 33.103(f)(4).

⁷ In 1995, Steven Kelman, then-Administrator of the Office of Federal Procurement Policy, asked the Federal Bar Association's Government Contracts Practice Area group to draft a proposed FAR rule on agency-level protest procedures. The group's draft included a mechanism for limited discovery, providing three alternatives: an agency report, a meeting of the parties, and the provision of documents. See Melanie I. Dooley, *Bid Protests: Controversy Surrounds Draft FAR Rule on Agency-Level Protest Procedures*, 65 Fed. Cont. Rep. (BNA) 6 d3 (February 12, 1996). This proposal was ultimately not adopted.

⁸ For example, AMC resolves protests in an average of 17 working days and sees very few of its decisions “appealed” to the other protest fora – arguably indicating that its protest decision makers are making sound judgment calls. Of the 633 decisions in agency-level protests at AMC between 1991 and 2004, only 57 have been “appealed” and only 4 of those protests have been sustained. Meza Interview, *supra* note 3. The USACE program has a similar record. In the past 5 years, the GAO has “overturned” only a handful of the USACE's agency-level

number of litigated protests, the agency-level bid protest system has undoubtedly achieved positive results – it *is* working. The more decisive questions, which this Article examines, are whether the system is working as well as it should and whether the changes to the system proposed by government procurement reformers on Capitol Hill are appropriately tailored to bring about true and lasting improvement.⁹ The discussion below proceeds in three parts. Part II provides background on the agency-level bid protest forum. Part III discusses the agency-level bid protest procedures set out in FAR 33.103 as well as some of the supplemental procedures adopted by various federal agencies.

Part IV discusses the current system's effectiveness and the expected viability of the proposed reforms. The Part concludes that although the agency-level forum falls short of its potential for reducing litigation and adversarialism in the bid protest arena, the proposed reforms fail to appreciate the true nature of the system's intrinsic trade-offs and, in the end, offer incomplete and potentially counterproductive solutions. The Part presents a critique of the specific legislative reform proposals and offers potential solutions that may serve to bring the agency-level bid protest forum closer to center stage in the bid protest arena.

II. SHORT HISTORY OF THE AGENCY-LEVEL BID PROTEST FORUM

Although the practice of contractors bringing their bid protests to contracting officers has longstanding precedent,¹⁰ the formal protest structure currently embodied in FAR 33.103 was

decisions. Thornton Interview, *supra* note 4.

⁹ In 2004, the House of Representatives Government Reform Committee considered the Acquisition System Improvement Act (ASIA), H.R. 4228, 108th Congress, 2nd Sess. §§ 104, 303N (2004). The bill included a provision aimed at reforming the agency-level bid protest system. See *infra* notes 74-80 and accompanying text for a discussion of the relevant ASIA language.

¹⁰ See e.g., John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts 1484 (3d ed. 1998).

"born" out of former-Vice President Al Gore's "Reinventing Government" initiative¹¹ during the Clinton Administration. In the late 1980s and early 1990s, many within government and industry expressed concerns that the bid protest arena was becoming too confrontational and expensive.¹² Anecdotal evidence from the time suggests that contracting officers, out of fear of protracted litigated protests, were cutting back their communications with contractors to avoid giving them potential "protest material," and shifting their focus away from getting the best products and services and toward building thoroughly-papered, "protest-proof" award files.¹³ The result was inefficiency, expense, and a stagnancy in the procurement system brought on primarily by the stunted exchanges of information.¹⁴

The first significant effort to establish an alternate, agency-based protest forum came from the Army Materiel Command (AMC). Concerned about its growing number of increasingly judicialized and costly protests at the existing protest fora, AMC initiated a one-year agency-level protest test program in mid-1991.¹⁵ At the end of the year, AMC personnel found they had resolved bid protests in an average of 16 working days (compared to the GAO's 76 day average)¹⁶ and had significantly reduced protestor costs.¹⁷ AMC made the program permanent in

¹¹ The initiative was formally known as the National Performance Review. Its stated purpose was to "move from red tape to results to create a government that works better and costs less."

¹² See generally the National Performance Review Report, "Reinventing Federal Procurement" (September 14, 1993), available at <http://govinfo.library.unt.edu/npr/library/nprpt/annrpt/sysrpt93/reinven.html>.

¹³ *Id.* ("People in industry and government believe that communication during the procurement process has been curtailed because of the fear that a statement by a government official will be misunderstood and will inadvertently trigger a protest. This causes inadequate debriefings of offerors, which in turn creates suspicion...."). Congress also sought to address the information sharing problem by beefing up the pre- and post-award debriefing requirements with passage of the Federal Acquisition Streamlining Act of 1994 and the Clinger-Cohen Act of 1996.

¹⁴ *Id.*

¹⁵ AMC's stated mission was to design a simple and flexible program that could resolve contractor concerns in a non-adversarial manner without the delays, increased administrative costs, and adverse mission impacts associated with litigation at the existing bid protest fora. Meza Interview, *supra* note 3.

¹⁶ *Id.*

¹⁷ AMC estimated that it cost one-half as much or less to protest to AMC HQ as it did to protest to the GAO. See Dooley, *supra* note 7.

1993.¹⁸ In 1995, the Office of Federal Procurement Policy (OFPP) identified the AMC protest program as one of the ten best practices in the federal government.¹⁹ Later that year, the Clinton Administration incorporated the agency-level bid protest mechanism into its “Reinvention” agenda when President Clinton issued an executive order on agency protests.²⁰ The order directed federal agencies to “establish administrative procedures for the resolution of protests... as an alternate to protests in fora outside of the procuring agencies.”²¹

The language of the executive order largely reflected the philosophy of the AMC program, culling its principles of open communication, efficiency, flexibility, and fairness into the following key themes:

- All parties to the procurement must use their best efforts to resolve protests with agency contracting officers.
- Protest procedures should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests – including the use of alternative dispute resolution techniques.
- Decisional review of protests should be provided at a level above the contracting officer whose decision or action allegedly violated a statute or regulation and prejudiced the protestor.
- The award or performance of contracts should be held in abeyance while a timely-filed protest is pending before the agency, unless urgent and compelling reasons or the best interests of the Government would require immediate contract award or performance.²²

The order also directed that the FAR be amended to further the purposes of the order. FAR

¹⁸ Meza Interview, *supra* note 3.

¹⁹ *Id.* The administration’s general view of all types of protests, often enunciated by then-OFPP Administrator Steven Kelman, was that they were inefficient and “un-businesslike” in that they unduly delayed the procurement process, cost too much, and fostered adversarialism between contractors and their government customers. See generally Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627 (good discussion of Kelman’s views). As such, it is not surprising the administration embraced the agency-level bid protest mechanism and its offered efficiencies.

²⁰ Exec. Order No. 12,979, 60 Fed. Reg. 55,171 (1995).

33.103 was the result.²³

III. AGENCY-LEVEL PROTEST FUNDAMENTALS

A. FAR 33.103

From a mechanical perspective, agency-level bid protests are brought in much the same manner as protests at the other protest fora. An agency-level protest must be filed in writing with the contracting officer or other designated official²⁴ by an interested party²⁵ and concern (1) the terms of a solicitation, (2) the cancellation of a solicitation, (3) the award or proposed award of a contract, or (4) the termination or cancellation of an award of a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.²⁶

In the post-filing setting, however, the agency-level forum's distinctives are quite apparent, informed primarily by the express purpose of its existence, i.e., that of providing a non-confrontational and economical alternative to the other protest fora (with the further aim of reducing the number of protests to those fora).²⁷ Consistent with this purpose, the language of FAR 33.103 is characterized by an emphasis on efficiency, open communication between the parties, and flexibility.

²¹ *Id.*

²² *Id.*

²³ The Civilian Agency Acquisition Council and Defense Acquisitions Regulations Council issued the final rule on January 2, 1997. 62 Fed. Reg. 270 (1997).

²⁴ FAR 33.103(d)(3).

²⁵ FAR 33.101 ("Interested party" is defined as "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract"). This mirrors the definition established through GAO opinions.

²⁶ FAR 33.101 (defining "protest").

²⁷ See FAR 33.103(d) ("the following [agency-level bid protest] procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of

With efficiency as its primary objective, FAR 33.103 substitutes open and informal communication between the parties for the formal litigation-type practices that slow the protest process in the other protest fora. Four provisions specifically encourage or provide opportunity for inter-party communications. First, FAR 33.103(b) calls for “open and frank discussions” between the parties at the very earliest stage of the process – even before the protest is submitted. The FAR drafters understood that the agency-level system would work best, producing the desired efficiencies and equitable results, if the agencies and their contractors worked collaboratively to resolve problems from the very start. Second, FAR 33.103(c) recommends the use of alternative dispute resolution techniques and third-party neutrals to resolve protests. Again, the emphasis is on face-to-face, non-confrontational communication.²⁸ Third, FAR 33.103(g) provides that “to the extent permitted by law and regulation, the parties may exchange relevant information.” This is the agency-level system’s discovery equivalent – but its permissive language (“may”) is telling. Standard litigation-style discovery practices, such as the use of depositions and interrogatories, are not a part of the agency-level system. However, agencies have broad leeway to share information in a manner and form appropriate to the circumstances of each protest. Fourth, FAR 33.103(h) requires that agencies provide contractors with well-reasoned, written explanations for their decisions.

While the open and informal exchange of information is a hallmark of the agency-level system (and the foundation of its efficiencies), from the perspective of the participants, the measure of the system’s effectiveness is found in its capacity to balance the competing demands of efficiency and fairness. The time provided for processing agency-level protests is about one-

the agency”).

third of the 100-day GAO decision requirement. As such, the system is built on a series of compromises between speed and thoroughness.

The agency-level rules of FAR 33.103 promote efficiency in several ways. First, the protest filing procedures are simple and straightforward. FAR 33.103(d)(2) succinctly and precisely spells out exactly what information the protesting contractor must present to the agency.²⁹ Second, the system does *not* incorporate formal discovery procedures which could otherwise drastically increase the time and expense of protests. Correspondingly, the forum does not follow standard litigation procedures – there are no pleadings, briefs, or motions. As a result, contractors can, and very often do, bring their protests without the assistance of legal counsel. Third, FAR 33.103(e) requires contractors to file their protests expeditiously. Protests based on apparent solicitation improprieties must be filed before bid opening or the closing date for the receipt of proposals.³⁰ In all other cases, contractors must file protests no later than 10 days after the basis for the protest is known or should have been known.³¹ Finally, FAR 33.103(g) sets a 35 day goal for protest resolution.³²

²⁸ In practice, many agencies have merged their agency-level bid protest programs into their larger, agency-wide alternative dispute resolution (ADR) programs.

²⁹ The provision states that protests shall include the following:

- (i) Name, address, and fax and telephone numbers of the protestor.
- (ii) Solicitation or contract number.
- (iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protestor.
- (iv) Copies of relevant documents.
- (v) Request for a ruling by the agency.
- (vi) Statement as to the form of relief requested.
- (vii) All information establishing that the protestor is an interested party for the purpose of filing a protest.
- (viii) All information establishing the timeliness of the protest.

³⁰ FAR 33.103(e).

³¹ *Id.* As originally written, the rule gave protesters 14 days to file. This was reduced to 10 days in early 1997. The current filing rules closely resemble the GAO rules. *See generally* 4 C.F.R. § 21.1.

³² More specifically, the provision states that agencies shall “make their best efforts” to resolve protests within 35 days after the protest is filed.

Two key elements of the agency-level system provide the due process protections that promote just outcomes. First, agencies are required to provide contractors an opportunity for an “independent review” of their protests at a “level above the contracting officer.”³³ Agencies must “designate the official(s) who are to conduct this independent review” (who may or may not be in the contracting officer’s supervisory chain) and to see to it, “when practicable,” that these officials have not had previous involvement in the procurement.³⁴ The obvious expectation is that a decision-maker coming to the protest with a blank slate and no personal stake in the outcome will be more likely to act independently and, as a result, more willing to decide against her own agency and provide a contractor with meaningful relief when such relief is warranted.

The second fairness-promoting element of the agency-level protest system is the “stay” and “stop work order” mandate of FAR 33.103(f).³⁵ Under this provision, a contractor who files a timely protest³⁶ is assured that the procurement he is protesting will be put on hold until his protest is resolved – preserving his right to a meaningful remedy.³⁷ The stay pertains to pre-award protests. It requires that the agency refrain from awarding the contract while the protest is

³³ FAR 33.103(d)(4) (providing that “in accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer”).

³⁴ *Id.* For a good discussion on the topic of how agencies might go about selecting their independent reviewing officials, see Jeffrey I. Kessler, *Tips for Agencies in Establishing Protest Procedures, and Factors Potential Protestors Should Consider in Selecting a Forum*, *The Government Contractor*, February, 19, 1997, ¶ 81 at 3-4. The author notes that, “as a practical matter, officials one step above the CO [Contracting Officer] will normally be precluded from being the designated agency official.”

³⁵ FAR 33.103(f) does not actually use the terms “stay” and “stop work order.”

³⁶ In order to gain entitlement to a “stop work order,” a contractor must file a post-award protest within 10 days after contract award or within 5 days after a debriefing. This rule differs from the general timeliness rule of FAR 33.103(e) for the filing of protests. FAR 33.103(f)(3).

³⁷ The same holds true for bid protests filed with the GAO. The GAO bid protest regulations provide, in pertinent part, that “where a protest is filed with the GAO, the contracting agency may be required to withhold award and to suspend contract performance.” 4 CFR § 21.6. The regulation is grounded in 31 U.S.C. § 3553 (c) and (d), which provides a mandatory stay/stop work order once the agency has received notice of a protest filed with the GAO.

pending.³⁸ The stop work order requirement arises in the context of post-award protests. It requires that the agency halt performance on the contract while the protest is pending.³⁹ Although the stay and stop work order are mandatory,⁴⁰ agencies can override them when there is a written determination, approved at a level above the contracting officer, that pressing on with contract award or performance is necessitated by either urgent and compelling reasons or the best interest of the Government.⁴¹ While clearly a necessary element of the system, the agency's ability to override the stay or stop work order is a potentially powerful tool that could, if misused, upset the forum's efficiency/fairness balance.⁴² However, agencies rarely use their override authority – probably because most protests are resolved quickly enough that they moot the override issue.⁴³ Pursuing an agency protest does not extend the time period in which a contractor may obtain a stay or stop work order at the GAO.⁴⁴

Finally, the agency-level protest forum's broad range of available remedies also promotes fair outcomes. FAR 33.102(b)(1) empowers agencies to take any action or grant any remedy that could be recommended by the Comptroller General if the protest were to be filed with the GAO. With this language, the FAR is referencing 4 C.F.R. § 21.8(b) which lists the recommendations,

³⁸ FAR 33.103(f).

³⁹ *Id.*

⁴⁰ Government contracts attorneys in the private bar contend that, despite the FAR's mandatory language, agencies are inconsistent in enforcing stays and stop work orders. Pachter/Shaffer Interview, *supra* note 5.

⁴¹ FAR 33.103(f)(1), (3). Stays/stop work orders issued in GAO cases are also subject to potential override. 31 U.S.C. § 3553(c) and (d) provide that the "head of the procuring authority" may authorize award or performance of the contract, notwithstanding the protest, upon a determination that compelling circumstances so warrant.

⁴² See Kessler, *supra* note 34 at 5 ("reality dictates that [contractors] will hesitate to use [the agency-level bid protest] forums if those forums routinely issue overrides prior to decisions on the merits").

⁴³ This conclusion is based on the limited available data. AMC has never overridden a stay or stop work order stemming from a protest brought to the agency-level forum. Meza interview, *supra* note 3. It also comports with the data for GAO protests, which shows that agencies use their override authority relatively infrequently. In FY2002, agencies exercised their override authority in 71 cases (6 pre-award, and 65 post-award) out of a total of 1,204 bid protests filed at GAO. The GAO ultimately sustained the underlying protests in only 8 of these cases. See GAO Bid Protest Annual Report to the Congress for FY2002, B-158766, January 29, 2003.

⁴⁴ FAR 33.103(f)(4). Agencies may, however, voluntarily extend the stay – although no agency has made this a

or combinations thereof, that the GAO may make regarding corrective action. The list of available remedies includes termination of the contract, re-competing the contract, or issuing a new solicitation.⁴⁵ Additionally, FAR 33.102(b)(2) provides that agencies may pay protest costs under the same standards that costs are payable to a prevailing party in a GAO protest.

B. Agency Procedures

As discussed above, Executive Order 12979 directed all federal agencies to establish procedures for the resolution of protests. By and large, FAR 33.103 serves that purpose. However, the FAR drafters deferred some discretion to agencies to regulate their own programs, and thus most agencies have issued supplemental regulations to address these discretionary matters – in varying degrees of depth and detail.⁴⁶ At the baseline, agencies have virtually unfettered discretion in determining what level of agency resources will be devoted to actually resolving protests. Although FAR 33.103 requires that agencies provide some in-house mechanism for resolving protests, it does not compel them to choose a mechanism that will actually attract contractor participation by fairly balancing efficiency and due process considerations.

Apart from the initial resource allocation issue, three significant matters are left to agency discretion. First, agencies are permitted to determine the structure of their agency-level forum's independent review mechanism.⁴⁷ As a starting point, all agencies allow contractors to file their protests directly with the contracting officers.⁴⁸ This accords with precedent of much longer-

regular practice.

⁴⁵ See 4 C.F.R. § 21.8(b).

⁴⁶ For example, the Department of State's supplement (48 C.F.R. § 633.103) comes in at just one sentence while the Department of Veterans Affairs supplement (48 C.F.R. § 833.103) covers multiple pages.

⁴⁷ See FAR 33.103(d)(4).

⁴⁸ See FAR 33.104(d)(3) (providing that "all protests filed directly with the agency will be addressed to the

standing than Executive Order 12979 or FAR 33.103.⁴⁹ Overlaying that, agencies can structure the independent review mechanism in one of two ways. They may provide the independent review either as an alternative to bringing the protest to the contracting officer⁵⁰ or as an appeal of a contracting officer's decision.⁵¹

Second, agencies have broad discretion in determining who will fill the role of the independent protest decision authority.⁵² This is probably the most important determination agencies make relating to their agency-level programs. The perceived expertise, independence, and influence of an agency's decision-making authority may very well determine the success of its bid protest system.⁵³ Agencies have taken diverse approaches in assigning protest decision-making authority. At one end of the spectrum, the Air Force strongly encourages contractors to file their protests with the contracting officers and provides the independent review at the lowest

contracting officer *or* other official designated to receive protests").

⁴⁹ See *supra* note 10.

⁵⁰ The National Aeronautics and Space Administration (NASA), Department of Justice, and Department of Labor are among the agencies that use this approach. See 48 C.F.R. §§ 1833.103(c) (NASA), 2833.103(d) (Justice), and 2933.103(a)(2) (Labor). Solicitations must advise potential bidders and offerors of the existence of the independent review mechanism and whether it is available as an alternative to consideration by the contracting officer or as an appeal of a contracting officer's decision. FAR 33.103(d)(4).

⁵¹ The Department of the Air Force uses this approach. See 48 C.F.R. § 5333.103-90(b).

⁵² See FAR 33.103(d)(4) ("Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be in the contracting officer's supervisory chain.").

⁵³ See Kessler, *supra* note 35 at 4.

Whoever acts as the protest decision authority must not only have experience in the field of government contracting ... and knowledge of the FAR, but also a knowledge of how the most recent case law interprets the FAR. The decisions of the protest decision authority will be reviewed by these forums, and under their legal standards. The protest decision authority must be aware that his decision is quasi-judicial in nature, and is not a management-type decision, which is the mode in which this person typically acts... No matter who is selected as the protest decision authority, the bottom line is this: that person must wield sufficient clout within the bureaucracy to be able to sustain a meritorious protest, an action which is likely to be resisted by the CO and his chain.

level above the contracting officer where independence can be achieved.⁵⁴ At NASA, on the other hand, the independent review function is centralized at the relatively high level of the Office of the Assistant Administrator for Procurement.⁵⁵ A number of other agencies have placed their protest decision authority in the hands of the "Head of the Contracting Activity" (HCA).⁵⁶

Finally, agencies have discretion in identifying who within the agency will make 'stay' override determinations.⁵⁷ The agencies have taken various approaches; however, most have designated the HCA to fill this role.

C. *The Army Material Command (AMC) Program*

When it comes to agency-level programs, AMC probably offers the most well-developed system.⁵⁸ The AMC system's primary distinction is that it provides the independent review mechanism through its Office of Command Counsel, with the Command Counsel and Deputy Command Counsel designated as the primary and alternate protest decision authorities.⁵⁹ This approach offers two significant benefits. First, the Office of Command Counsel attorneys who

⁵⁴ See 48 C.F.R. § 5333.103-90(a) ("Offerors are encouraged to file at the lowest level to resolve the issues concerned." "When an agency protest is denied, an offeror may request an independent review at a level above the contracting officer.").

⁵⁵ See 48 C.F.R. § 1833.103(c). The Department of Veterans Affairs takes much the same approach, providing the independent review as an alternative to a protest to the contracting officer and identifying several high level offices as the protest decision authorities. See 48 C.F.R. § 833.103(a).

⁵⁶ FAR 2.101 defines the "Head of the Contracting Activity (HCA)" as "the official who has overall responsibility for managing the contracting activity." The Department of Energy and Department of Agriculture are among the agencies that have taken this approach. See 48 C.F.R. §§ 933.103(f) (Energy) and 433.103(a) (Agriculture).

⁵⁷ FAR 33.103(f) (the justification for an override "shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures").

⁵⁸ See *supra* notes 15-19 and accompanying text. The AMC program won the 2003 Office of Federal Procurement Policy award for outstanding acquisition-related alternative dispute resolution programs.

⁵⁹ See the HQ, AMC-Level Protest Program Procedures, available at http://www.amc.army.mil/amc/command_counsel/protest/bidprotest.html. The Army Corps of Engineers and National Guard Bureau utilize similar approaches, designating their "Chief Counsels" as protest decision authorities. See e.g., Engineer Federal Acquisition Regulation Supplement (EFARS) 33.103(d)(3)-100(1)(ii); National Guard

evaluate the protest cases are outside of the contracting officer's chain of command – and, for that matter, outside of the acquisition workforce.⁶⁰ As such, they arguably come to each protest with no personal stake in its outcome or in the outcome's reflection on the AMC acquisition system and workforce. Second, the Command Counsel attorneys have substantial experience in the field of bid protests and are well-versed in the FAR and case law interpreting the FAR.⁶¹ They are the same attorneys who handle AMC's GAO bid protest litigation.⁶²

The other unique feature of the AMC program is that it operates on a timeline stricter than that provided in FAR 33.103 for processing protests. AMC requires its contracting officers to provide the Office of Command Counsel with an administrative report responsive to a protest within 10 days after the protest is filed.⁶³ The Command Counsel must then issue a written decision within 20 working days after the protest is filed.⁶⁴ Over the years, AMC has resolved protests in an average of 17 working days.⁶⁵

IV. WHERE DO WE GO FROM HERE?

A. *Review and Critique of Legislative Reform Proposals*

In the past several years, the agency-level bid protest system has caught the attention of Representative Tom Davis, Chairman of the U.S. House of Representatives' Government Reform Committee.⁶⁶ Congressman Davis has made it his practice to annually introduce a

Federal Acquisition Regulation Supplement (NGFARS) 33.103(c)(4)(s-100).

⁶⁰ Meza interview, *supra* note 3.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See HQ, AMC-Level Protest Program Procedures, *supra* note 59.

⁶⁴ *Id.*

⁶⁵ Meza interview, *supra* note 3.

⁶⁶ The Committee has jurisdiction over "all matters relating to the overall efficiency and management of government operations," which encompasses the regulatory aspects of government procurement.

broad-ranging bill aimed at reforming various aspects of the federal procurement system.⁶⁷ Each of his recent bills has included a provision⁶⁸ that would provide statutory authority for the agency-level bid protest process⁶⁹ and codify certain fundamental program elements – including some which vary considerably from the forum’s current rules.⁷⁰

The proposed changes to the system have come at the urging of contractors and members of the private bar who are dissatisfied with the status quo.⁷¹ They like the forum’s efficiencies but believe the various agency programs are not capable of producing fair and reasonable results in many protest cases, particularly the more complex ones.⁷² Accordingly, the stated objective of the reforms is to broaden the forum’s appeal to contractors – with the greater goal being the reduction of litigation and adversarialism in the bid protest arena.⁷³

The following are the key elements of the most recent legislative proposal along with a summary of the existing pertinent FAR rules:

- Agency heads will act as protest decision authorities.⁷⁴ FAR 33.103(d)(4) currently gives

⁶⁷ In 2002, his bill was entitled the Services Acquisition Reform Act (SARA). H.R. 3832, 107th Congress, 2nd Sess. (2002). The 2003 bill carried the same name. H.R. 3832, H.R. 1837, 108th Congress, 1st Sess. (2003). In 2004, the reform bill was called the Acquisition System Improvement Act (ASIA). *See supra* note 9.

⁶⁸ The bills’ provision relating to agency-level bid protests has evolved over time. ASIA contains two provisions that were not in either version of SARA: a provision prohibiting judicial review of agency-level bid protest decisions, and a provision that prevents agency-level protestors from filing simultaneous actions with the U.S. Court of Federal Claims. Also, the first iteration of SARA envisioned a 10-day time frame for resolving protests. The time frame was increased to 20 days in the second SARA bill and remained at 20 days in ASIA.

⁶⁹ *See* H.R. 4228, 108th Congress, 2nd Sess. §§ 104, 303N (2004). The general language establishing the statutory authority for the agency-level system reads as follows: “An interested party may protest an acquisition of supplies or services by an agency based on an alleged violation of an acquisition law or regulation, and a decision regarding such alleged violation shall be made by the agency in accordance with this section.”

⁷⁰ The legislation would concurrently amend Title 10 of the United States Code by adding a new Section 2305(b), and Title 41 of the Code (the Federal Property and Administrative Services Act of 1949) by adding a new Section 303N.

⁷¹ *See supra* notes 5-7 and accompanying text.

⁷² For example, those involving “best value” decisions. Pachter/Shaffer Interview, *supra* note 5.

⁷³ *See Acquisition Reform: Rep. Davis Offers Bill to Consolidate Agency Boards of Contract Appeals*, 81 Fed. Con. Rep. (BNA) 499 (May 4, 2004).

⁷⁴ H.R. 4228, 108th Congress, 2nd Sess. §§ 104(a) and (b) (2004). By way of example, in the Department of Defense, “head of the agency” means the Secretary of Defense, Secretary of the Army, Secretary of the Navy, and the Secretary of the Air Force. 48 C.F.R. § 202.101 (Defense Federal Acquisition Regulation Supplement).

agencies discretion in naming their protest decision authorities, providing only that the independent review of protests must be conducted at a “level above the contracting officer.”

- Agencies must render decisions on protests within 20 working days after the date of their submission.⁷⁵ FAR 33.103(g) currently provides that agencies “make their best efforts to resolve agency protests within 35 days.”
- Agencies must suspend protested procurements while protests are pending internally and during any subsequent protests of the same matter to the GAO – as long as the protest is filed at the GAO within 5 days after issuance of the agency decision.⁷⁶ FAR 33.103(f)(4) currently makes voluntary the practice of extending the suspension to subsequent GAO protests.
- “Heads of acquisition activities” will be responsible for determining whether to proceed with procurements in the face of protests.⁷⁷ FAR 33.103(f) currently provides that such determinations be approved “at a level above the contracting officer, or by another official pursuant to agency procedures.”
- Protest decisions would not be subject to judicial review.⁷⁸ FAR 33.103 does not currently contain any similar provision.

Although the objective of the reforms is laudable and probably universally acceptable,⁷⁹ the ultimate question is whether they will have their intended effect. On this point, the legislative record offers little insight. The record is remarkably sparse⁸⁰ and fails to develop the

⁷⁵ *Id.*

⁷⁶ *Id.* at § 104(c).

⁷⁷ *Id.* at §§ 104(b)(2), 104(c)(2), 303N(b)(2), and 303N(c)(2).

⁷⁸ *Id.* at §§ 104(e) and 303N(e).

⁷⁹ Although some would accept the proposition that the goal of reducing litigation in the bid protest arena is paramount, others would require that the effort to reduce litigation not come at the expense of other procurement system objectives – such as competition and transparency.

⁸⁰ The House Government Reform Committee did not hold hearings on ASIA. It did hold hearings on the two SARA initiatives in 2002 and 2003. The great bulk of the testimony at those hearings addressed other reform topics. Testimony regarding the proposed reforms to the agency-level protest system was largely perfunctory. Following are the high points of that testimony: At a SARA hearing on April 30, 2003, Bruce Leinster, testifying on behalf of the Information Technology Association of America, opined that strengthening the forum’s ‘stay’ provision would reduce the number of protests to the other fora. Mr. Leinster’s testimony can be found at <http://www.itaa.org/es/docs/030702saratestimony.doc>. Steven Kelman testified that contractors would be more likely to use the agency-level protest forum if they could be assured they wouldn’t lose out on their GAO stay. Mr. Kelman’s testimony is summarized at 77 Fed. Cont. Rep. (BNA) 271 (March 12, 2002), *Styles Voices Concerns About SARA Training Fund, Other Provisions*. Finally, William Woods from the GAO stated that requiring protests to be decided by the head of the agency “may help to mitigate longstanding concerns about a perceived lack of

particulars of how the reforms will produce and maintain greater contractor satisfaction with the forum. Two specific “record-building” deficiencies stand out.

First, the record lacks any empirical support for the proposition that agencies can, in fact, resolve protests in 20 days while still giving them a reasonable measure of thoughtful and deliberate review. While it is true that the AMC agency-level program has an established track record of resolving protests in under 20 days, it is not at all clear that other agencies have either the resources or the ability to work so quickly. In fact, the fair conclusion is that most agencies are currently taking much closer to 35 days to resolve protests.⁸¹ As such, they would have to drastically increase the pace at which they review bid protests if the 20-day requirement is adopted. Agencies would have to choose one of two paths to achieve the required results – they would either have to augment the resources currently devoted to resolving the protests (at some additional cost) or cut back on the thoroughness with which they consider them. In today’s world of fiscal constraints, agencies are more likely to take the latter approach.

Second, the record is bereft of consideration of the impact that giving protest decision-making authority to agency heads will have on the agencies’ ability to review protests in a timely manner. The immutable bureaucratic reality is that, if agency heads get involved, the bid protest review process will be burdened by the weight of multiple additional layers of administrative review. Agencies will then have less time to do the real substantive work of actually analyzing the protests.

independence when decisions on agency-level protests are issued by officials closely connected with the decisions being protested.” His testimony is available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-802R>.

⁸¹ The US Army Corps of Engineers program, which is quite similar to the AMC program, resolves protests in an average of about 35 days. Some of the more complex protests require considerably more time. Thornton Interview, *supra* note 4. The Department of Commerce has specifically incorporated the FAR’s 35-day protest resolution time standard in its agency supplement to FAR 33.103. See 48 C.F.R. § 1333.103(b)(2).

In both instances, these reform proposals may well produce results contrary to those intended. In combination, they could be disastrous. With less time to review protests, agencies would have to be less thorough. The inevitable result would be a drop in the number of "sustained" protests or other outcomes favorable to contractors. With a reduction in favorable outcomes would come a corresponding decline in contractor willingness to bring anything but the simplest of protests to the forum.

The more pressing problem with the reform proposals, however, is that they reflect a lack of understanding of the nature of the systemic change necessary to achieve their ultimate objective. As things stand, the agency-level forum fills a modest niche. It primarily attracts those bid protests that contractors regard as candidates for efficient (i.e., prompt and inexpensive) resolution.⁸² These tend to be the less "information intense" protests, such as pre-award protests against solicitation terms and post-award protests relating to the timely receipt of bids, bid responsiveness, and mistakes in bids.⁸³ The forum occupies this limited field because its efficiencies are wedded to certain constraints, the chief constraint being the absence of formal discovery procedures.

Where the reformers have gone wrong is in concluding that adjustments to some of the forum's lesser efficiency/due process trade-offs will provide the impetus to induce substantially greater contractor utilization of the forum. Simply put, while this approach may change a few

⁸² Although the number of agency-level protests at AMC and the USACE have fallen off in recent years, the proportion of GAO protests to agency-level protests has remained roughly the same – averaging about 2.5 to 1 at AMC and about 1 to 1 at the USACE. See *supra* note 5. A fair conclusion is that contractors have developed a good sense for which protests to take to the agency-level forum and which to take to the GAO or COFC.

⁸³ Thornton Interview, *supra* note 4. These types of protests relate to agency decisions that are relatively objective in nature and do not involve factually-complex issues, extensive analysis, the evaluation of proposals, or comparisons between proposals. As such, these decisions are not based on and do not generate vast quantities of potentially discoverable information.

contractor minds, it will do little in the long run to allay their reservations about the system's capacity to handle a broader range of protest types – which reservations are ultimately grounded in the forum's lack of transparency.

B. *Some Proposals*

In its eight-year history, the agency level bid protest forum has performed more or less as expected. By means of integrating various trade-offs in favor of efficiency, the forum was designed to provide contractors and agencies an economical and non-adversarial forum for resolving some (but certainly not all) bid protests. It has done so.⁸⁴ That said, the fact is that many in industry and the private bar still harbor discontent with the agency-level system.⁸⁵

As discussed above, industry's discontent is ultimately grounded in its lack of access to information relating to agency decision-making in the bid protest process. Contractors are unwilling to place their entire trust in a system that often prevents them from seeing whether their protests are receiving full and fair agency consideration. Although the agency-level bid protest rules were not intended to create a complete barrier to contractor access to agency files,⁸⁶ in practice agencies have tended to be somewhat disinclined to share information.⁸⁷ In this

⁸⁴ This assumes, of course, that the forum, by its mere existence, has not simply generated protests that contractors would have otherwise forgone due to the expense of proceeding in the existing fora. Given the relative dearth of agency-level bid protest data from the agencies, there is no effective means for measuring whether protests filed at the agency level would have otherwise seen the light of day if the forum did not exist. The safe assumption is that at least some percentage of the protests brought to the agency level would have been filed with the GAO or COFC.

⁸⁵ The agency-level alternative clearly has its limits in our system – it will never be the forum of choice for every type of protest. For one thing, the GAO forum provides unmeasured “value added” with its bid protest reviews – particularly in terms of its forward looking, macro-level “where do we want to go from here with our government procurement system” vision. Nevertheless, widespread discontent generally signals a true shortcoming.

⁸⁶ In fact, as discussed *infra*, one of the hallmarks of the agency-level forum is its promotion of open communication between agencies and their contractors.

⁸⁷ To be sure, agencies are justified in wanting to keep the “discovery” to a minimum. By definition, with each incremental increase in discovery comes a concurrent decrease in efficiency. At some point, the efficiencies of the system are lost and it becomes a “GAO-lite.” However, the fact remains that there is still something of an institutional resistance on the part of some agency procurement personnel to the idea that it is all right to openly

regard, it appears the agency-level system has been captured, at least to some extent, by its own successes – or more precisely, by an agency preoccupation with efficiency at the expense of transparency and other potential procurement system objectives.⁸⁸

As a consequence, while the agencies speak with deserved pride about their efficient agency-level programs, they may perhaps not see that there is macro-level efficiency to be found in being somewhat less efficient on the micro level.⁸⁹ In other words, agencies would most likely find that if they took some modest steps toward being more open with contractors at the debriefing and bid protest stages and more considerate of contractor due process concerns they would see both fewer protests overall and a greater percentage of protests brought to the agency-level forum vice the other protest fora. Why? First, by ventilating their mistakes, agencies would be less likely to make similar “protestable” errors in future procurements. Second, upon seeing an increased willingness by agencies to share information in the spirit of achieving the mutual goal of a best value procurement, contractors would be more inclined to bring additional protests to the agency-level forum for resolution.

Unfortunately, institutional inertia will probably keep most agencies from changing their practices until they are prompted to do so. Following are some suggestions that may serve to

share non-privileged information with contractors or their attorneys – whether at the debriefing or protest resolution stages. Pachter/Shaffer Interview, *supra* note 5.

⁸⁸ See generally Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002).

⁸⁹ The best explanation for this lack of vision is that efficiency, at least in this facet of the procurement process, is of somewhat greater concern to agencies than it is to contractors. Agencies have to keep their procurements, and ultimately, their operations moving, and protests and litigation are a hindrance to that effort. Conversely, while contractors want efficiency, they also want to win contracts – so they invest effort in the undeniably inefficient practice of protesting agency decisions. Consequently, while agencies will invest to some degree in resolving protests via the informal mechanisms of the agency-level protest forum, they have insufficient incentive in most cases to look beyond the immediate process concerns to determine whether taking the extra time and effort to more openly communicate and share information with the contractor will benefit them in the long run by building greater contractor confidence in the system.

produce the necessary changes in agency practice and advance other of the objectives of our system of government procurement – all while not substantially diminishing the forum's efficiency, informality, flexibility, and responsiveness.

First and foremost, the agency-level rules should incorporate some form of *limited* discovery, whether in the form of an abbreviated agency report, a meeting between the parties, or the provision of some documents. Simply put, the system's permissive rules regarding the exchange of information have not enforced an adequate level of agency openness. However, the selected discovery mechanism should not go so far in requiring disclosure as to impose a necessity for protective orders.⁹⁰ This is an admittedly fine line. The point is that the discovery mechanism has to be balanced. It should create a definitive regulatory obligation for agencies to share information with contractors without dismantling the forum's efficiencies.⁹¹ This may be a hard sell for the agencies – but one selling point is that, by being more open with contractors, the agencies may well see greater competition in the procurement process and, ultimately, better

⁹⁰ Protective orders are a regular part of bid protest practice at the GAO and COFC. They are a means of controlling documents that may contain information (relating to the protestor's competitors) that is privileged or the release of which may result in a competitive disadvantage. For example, the GAO rules provide that:

At the request of a party or on its own initiative, GAO may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. Because a protective order serves to facilitate the pursuit of a protest by a protestor through counsel, it is the responsibility of protestor's counsel to request that a protective order be issued and to submit timely applications for admission under that order.

4 C.F.R. § 21.4

⁹¹ It may be necessary, in order to enforce adherence to the principle of efficiency, to specify (along the lines of the ASIA bill) that agency-level decisions would not be subject to judicial or administrative review. Although the GAO and COFC have accepted this principle in the past, the introduction of mandatory discovery language could well cause some to view discovery as an entitlement enforceable through litigation at other fora.

products and services.⁹²

In order to encourage agency conformity with the discovery requirement (in the absence of a formal enforcement mechanism), the agency-level rules should provide more precise direction regarding who may act as an agency's protest decision-making authority. The current requirement that the independent review be conducted at "a level above the contracting officer" is simply too liberal. When agencies vest decision-making authority at low levels and within the contracting officer's supervisory chain, contractors have legitimate concerns that the decisions rendered may be biased – whether knowingly or unknowingly. Further, lower-level procurement personnel are less likely to be inclined to push the "pro-information sharing" agenda.

That said, the "one-size-fits-all" approach of vesting protest decision-making authority in agency heads is too inflexible and would significantly reduce the system's responsiveness. Federal agencies come in various sizes and organizational shapes and with varying levels of contracting activity and procurement experience. As such, the individual agencies are in the best position to determine where to vest decision-making authority. Moreover, a great strength of the current system is that the people making the bid protest decisions, although independent, are still near enough to the procurement process to recognize problems and craft intelligent, workable solutions. Nevertheless, the operating principle should be that decision-making authority be vested outside the contracting officer's supervisory chain and, if possible, outside of agency acquisition channels. The programs run by AMC and the U.S. Army Corps of Engineers offer excellent models.

⁹² This could play out in several different ways. For example, contractors with better information regarding the reason for their non-selection for award or exclusion from the competitive range may be better positioned to compete in the next procurement. Or, by carrying on a more complete discussion with a contractor, an agency may find that it was wrong in excluding the contractor's proposal from the competitive range – and that contractor's

Third, the rules should provide for some manner of systemic transparency – particularly if the agency-level forum attracts a greater percentage of bid protests as a result of the other rule changes discussed herein. Although the forum’s informal, ADR-style protest resolution methods promote efficiency and flexibility, they also remove the protest decision-making process from public scrutiny. As the Darleen Druyun case demonstrates, efficient practices detached from meaningful external oversight can be a dangerous combination. The solution is to require agencies to publish their protest decisions. Not only would publicly available protest decisions provide systemic transparency and accountability, they would provide the ancillary benefit of offering contractors “future guidance” about how best to construct contract bids and proposals.

Finally, the rules should incorporate the strengthened “stay” provision promoted by the contracting community and included in the recent agency-level reform bills offered by Congressman Davis. Simply put, agencies will be encouraged to openness if they know that the failure to resolve a protest may well result in their procurements being held up for as long as 3 or 4 months because of back-to-back “stays.” Further, agencies will be more inclined to honor their “stays” and stop work orders because contractors will have immediate recourse to the GAO. At the same time, agency openness should result in fewer contractor follow-on protests to the GAO because contractors, having gotten better insight into the agency decision-making process, should have a greater degree of confidence that their disputes have been fairly considered by the agencies.

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